Supreme Court of the United States

No. .....

OCTOBER TERM, 1943.

H. HIGHFILL AND VALLEY CREDIT COMPANY, A CORPORATION, PETITIONERS,

VS.

LULU J. DILATUSH, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

1.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (Tr. 47)—not yet reported—will be reported as Lulu J. Dilatush, Appellant, vs. H. Highfill, Valley Credit Company, a Corporation, and R. E. Dilatush, Appellees, ... F. 2d .....

2.

JURISDICTION.

(1) The date of the judgment to be reviewed is February 2, 1944 (Tr. 48).

(2) Petition for Re-hearing was filed February 16, 1944 (Tr. 65), and was denied March 1, 1944 (Tr. 67).

(3) Plaintiff Lulu J. Dilatush, a resident and citizen of Illinois, sued H. Highfill, and R. E. Dilatush, each a resident and citizen of Arkansas, and Valley Credit Company, a corporation of Missouri, in the District Court for the Jonesboro Division of the Eastern District of Arkansas, alleging fraud in the procurement of certain notes secured by deed of trust on land in Missouri owned by the son of plaintiff, R. E. Dilatush.

The testimony of plaintiff, of her son, and of her attorney, developed facts from which findings were made by the District Court (*supra*, Statement of Case, in Petition). Motion for re-alignment of parties was granted, with dismissal of the suit (Tr. 15, 20). Plaintiff appealed to the Circuit Court of Appeals for the Eighth Circuit, which reversed the decision of the District Court, February 2, 1944, and on March 1, 1944, denied the petition for re-hearing.

This application is made within three months after the over-ruling of said motion for a re-hearing and after the entry of the decree sought to be reviewed by this Court.

4. The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347 (a), and Section 262 of the Judicial Code, 28 U. S. C. A. 377.

Cases believed to sustain said jurisdiction are as follows:

Bradford Electric Light Co. v. *Clapper*, 284 U. S. 221, 76 L. Ed. 254.

Connecticut Ry. & Light Co. v. *Palmer*, 305 U. S. 493, 494, 83 L. Ed. 309, 311.

Ecker v. *Western Pacific Railroad Corpn.*, 318 U. S. 448, 489, 87 L. Ed. 892, 940.

Gray v. *Powell*, 314 U. S. 402, 406, 86 L. Ed. 301, 307.

Helis v. *Ward*, 308 U. S. 365, 84 L. Ed. 327.

Indianapolis v. *Chase National Bank*, 314 U. S. 63, 72, 86 L. Ed. 47, 51.

Re 620 Church Street Building Corpn., 299 U. S. 24, 26, 81 L. Ed. 16, 19

3.

STATEMENT OF THE CASE.

To the summary statement given under heading 1 in the Petition, which is hereby adopted and made a part of this brief, we add the following:

R. E. Dilatush purchased a plantation in Missouri, subject to a first lien of nearly fifty thousand dollars, and giving to his vendor Claud Green a second lien against the land. His operations were not successful. Third and fourth liens were given to Valley Credit Company and Clay County Cotton Company (Tr. 32). He also had financial trouble with his wife, from whom he was separated (Tr. 34). In June, 1938, he wrote his mother, Respondent, that he had executed in her favor notes for $10,000 and $13,000, and a deed of trust securing them, saying: "I am merely doing this as a safeguard although Eda did not sign the deed of trust title

could not pass on this plantation without paying this off. So long as you can prove it was not a frame-up" (Tr. 31).

A judgment was taken against R. E. Dilatush by an oil dealer named Brown Little, and all the land was sold under execution for a nominal sum (Tr. 32).

R. E. Dilatush and H. Highfill signed a partnership agreement December 19, 1938, by which Dilatush agreed to furnish the land mentioned subject only to those liens prior to the deed of trust he had given his mother, listed as totaling $61,800. Highfill was general manager of Valley Credit Company and testified he was acting in its behalf so he could supervise the farming operations (Tr. 36, 37); that R. E. Dilatush said he would deliver the notes, and that there was never any suggestion of payment to Respondent; had there been, the transaction would not have been considered (Tr. 38). Funds were advanced by Valley Credit Company to take assignments of the liens of Clay County Cotton Company and Claud Green, and to pay personal unsecured accounts of R. E. Dilatush in excess of $7,000 (Tr. 38). R. E. Dilatush delivered the notes to H. Highfill, the deed of trust was foreclosed and the land purchased in the name of H. Highfill (Tr. 37), who agreed that upon demand he would re-convey to R. E. Dilatush a half interest in the land, subject only to the liens prior to the deed of trust given to Respondent (Tr. 42).

Although large additional amounts were advanced by Valley Credit Company to finance his farm operations, Dilatush was not successful, and it was decided to sell the land. He assisted in making the sale. The proceeds were insufficient to discharge his debt to Valley Credit Company, and a mortgage on his farm chattels was foreclosed. He was present at the sale and gave personal approval to the proceedings (Tr. 35). This still did not pay all his debt to Valley Credit Company.

Thereafter R. E. Dilatush consulted with his attorney about bringing this suit in the mother's name. She testified:

> "No representations of any kind were ever made to me in connection with these notes by any of the defendants other than my son. He came up here and got me to sign the notes over to Mr. Highfill (Tr. 26).
>
> "He said he would be back for the hearing whenever they bring the case to trial. Ever since the land was sold (meaning other land in Arkansas) my son has looked after all of my business affairs in that part of the country as I couldn't do it, it is too far from home. HE HAS LOOKED AFTER THIS LITIGATION FOR ME (Tr. 28).
>
> "My son said he would be back for the trial. I am depending on him to be there because he knows more about the case than I do; he knows what he has been doing and how he handled the business down there, and I was so far away I couldn't keep track of matters; I just depended upon him to look after my business" (Tr. 30).

W. Clifton Banta, one of Respondent's attorneys, testified:

> "The firm of Ashby and Banta had represented R. E. Dilatush prior to the bringing of these law suits. I had personally handled most of his litigation, however. The first information I had regarding this suit came from R. E. Dilatush. He talked to me about the case, giving me a full statement of the facts on which the complaints filed were based, and asked me if I would represent his mother. I said I would and we entered into a contract with her (Tr. 25).
>
> "Mr. Dilatush has let us have access to his files and has at all times been cooperative with us in connection with this litigation. We have also conferred with him regarding the same. He has manifested the same interest in behalf of his mother that the ordinary son would have.

"I would consider him insolvent at this time" (Tr. 26).

4.

SPECIFICATION OF ERRORS.

For their Specification of such Assigned Errors as are intended to be urged, petitioners adopt, and ask that they be considered a part hereof, the assignments set out in part II (a) of the Petition for the Writ, entitled "Reasons for Granting the Writ."

5.

SUMMARY OF ARGUMENT.

The argument is directed to showing that

1. The conduct of defendant R. E. Dilatush in behalf of the plaintiff (Respondent) in this litigation has been such as to require re-alignment of parties, placing him with plaintiff and thereby destroying Federal jurisdiction;

2. The decision of the Circuit Court of Appeals for the Eighth Circuit reversing the findings of fact and conclusions of law of the District Court to this effect was in conflict with applicable decisions of this Court and of usual procedure.

ARGUMENT.

The argument for the reasons for granting the Petition for a Writ of Certiorari will be taken up in the order that the reasons were presented in the Petition.

A.

The Decision of the Circuit Court of Appeals Is in Conflict with the Applicable Decisions of the Supreme Court.

1. In holding that "As each and all of them have failed and refused to pay, it is manifest that controversy exists between her and each of them, and it is immaterial whether the controversy arises from defendants' denial of liability or from their unwillingness to pay or from their inability to do so, or from all such causes" (Tr. 53).

This holding that indebtedness alone constitutes a sufficient "controversy" to sustain Federal jurisdiction is in conflict with decisions of this Court. It is manifest that the primary purpose of Respondent's suit is to take a judgment against petitioners; she is not interested in a judgment against her insolvent son.

In *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 72, 86 L. Ed. 47, 51, defendant Indianapolis Gas Company had defaulted in the payment of a debt for which Chase National Bank was Trustee. The Trustee prayed for judgment on the unpaid coupons. Yet this Court held that the fundamental issue was the obligation of the City of Indianapolis, and not the indebtedness of Indianapolis Gas Company; that

> "Chase and Indianapolis Gas have always been united on this issue; both have always contended for the validity of the lease and the City's obligation under it. * * * Plainly, therefore, Chase and Indianapolis Gas were, colloquially speaking, partners in litigation."

The Honorable Circuit Court of Appeals therefore erred in holding that indebtedness and prayer for judgment constitute a "controversy" between respondent and her son.

2. The circuit court of appeals erred in holding as contrary to the evidence the finding of the trial court that there was no collision or conflict of interest between the plaintiff (respondent) and her son (Tr. 54).

This holding was also in conflict with the *Chase Case, supra.* As stated in the latter:

> "What Chase wants, Indianapolis Gas wants, and the City does not want. Yet the City and Indianapolis Gas were made to have a common interest against Chase, when, as a matter of fact, the interest of the City and of Indianapolis Gas are opposed to one another."

A sufficient argument on this point is to use the quoted words with substitution of characters from this case:

> "What Lulu J. Dilatush wants, R. E. Dilatush wants, and Petitioners do not want. Yet Petitioners and R. E. Dilatush were made to have a common interest against plaintiff, when, as a matter of fact, the interests of R. E. Dilatush and Petitioners are opposed to one another."

3. The circuit court of appeals erred in holding that a suit "by one who charges refusal by another to pay a debt claimed to be due from him, presents the conflict interest that constitutes a controversy between the party plaintiff and the party defendant under the statute. 28 U. S. C. A. 41, Par. 1" (Tr. 54).

By this holding, the Circuit Court of Appeals again went contrary to the law as announced in the *Chase Case, supra.* Indianapolis Gas Company owed Chase National Bank as Trustee; the latter sued on this particular debt; but since the principal object of the suit was

not a judgment in favor of Chase against Indianapolis Gas, but one against City of Indianapolis (something which both Chase and Indianapolis Gas desired), there was no "controversy" between Chase and Indianapolis Gas. So, here, the fundamental purpose of the suit by Lulu J. Dilatush is a judgment against petitioners. She and her son both want that. A judgment against R. E. Dilatush is merely incidental, thought necessary in order to recover against petitioners, and is desired for no other purpose. There is no controversy between petitioner and her son.

Dawson v. *Columbia Avenue Saving Fund, etc., Co.*, 197 U. S. 178, 49 L. Ed. 713.

This suit arose over an indebtedness of Dawson Waterworks Company to the Trust Company, in connection with water works bonds, but was aimed primarily at the City of Dawson. The Court said:

> "We are of opinion that the bill should have been dismissed for want of jurisdiction. The waterworks company is admitted to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings, and arrange the parties according to their sides in the dispute. * * * There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. On the contrary, it appears from those allegations that the waterworks company insisted on its contract with the city, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals, and yielded to its demand. No difference or collision of interest or action is alleged or even suggested."

This Court will look beyond the "pretense of asking relief" against R. E. Dilatush, and will see that he insists

on the liability of his co-defendants (although they never had any contact with his mother); that he recognizes her pretended right to a judgment; and that there is no actual difference or collision of interest or action between them.

Niles-Bement-Pond v. *Iron Moulders Union*, 254 U. S. 77, 65 L. Ed. 145.

After defining an "indispensable party" as one having such an interest that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience, the Court said:

> "That there was not, and could not be, any substantial controversy, any 'collision of interest,' between the petitioner and the Tool Company is, of course, obvious from the potential control which the ownership of stock by the former gave it over the latter company, etc."

With petitioner's sworn statement that she had turned all her business over to R. E. Dilatush, and that he was managing the litigation for her, we do not believe a controversy between them possible, in a legal sense.

> "Looking, as the court must, beyond the pleadings, and arranging the parties according to their real interest in the dispute involved in the case (citations) it is clear that the identity of interest of the Tool Company with the petitioner required that the two be aligned as plaintiffs, and that with them so classified, the case did not present a controversy wholly between citizens of different states, within the jurisdiction of the district court."

Steele v. *Culver*, 211 U. S. 26, 53 L. Ed. 74, was a suit to prohibit the collection of two separate judgments, one

against a railway company and the other against the surety on an appeal bond given by the railway. Realignment was asked because the railway was a necessary party and its interests were all on the side of the plaintiff. In a decision written by Mr. Justice Holmes it is stated that the parties may be arranged according to their real interests; that "the railroad was sole master of the litigation against itself and we must assume is cooperating with the plaintiff in the present case." The testimony of respondent, of her son, of her attorney, the finding of facts by the trial Court, the recital of facts by the Circuit Court of Appeals, all show that the real interest and desire of R. E. Dilatush are that a judgment be rendered in favor of his mother, the respondent. They show that if he was not "sole master of the litigation" against himself, he at least selected the attorney by whom he wished to be sued, gave him the statement from which the charge of fraud was framed, delivered to him or to his mother for him all of his files and records, conferred with him frequently, and returned from California to Arkansas to testify, in an effort to make effectual the charges of fraud with which he had besmeared himself!

4. The decision of the circuit court of appeals was in conflict with applicable decisions of this court in holding that R. E. Dilatush "has no interest on the plaintiff's side in the law suit his mother has brought against him and others to justify re-aligning him on her side as a party plaintiff."

R. E. Dilatush entered into a partnership agreement with H. Highfill in consideration of which large amounts of money were advanced by petitioners. By this agreement he bound himself to furnish the land free of the lien then held by his mother (Tr. 38). The partnership contract was an Arkansas contract. The Supreme Court

of that State holds that a partnership is not liable for money borowed to buy an interest in the firm.

Dixie Cotton Oil Co. v. *Morris,* 79 Ark. 113, 94 S. W. 933.

Garner v. *Hallum,* 169 Ark. 295, 273 S. W. 1025.

Since R. E. Dilatush agreed to furnish the land to the partnership free of the lien of his mother's deed of trust, if he made an agreement with her as claimed by the complaint, it was for his own benefit, and he certainly has an interest in having these petitioners discharge the obligation which he owes to his mother.

In each of the cases cited under subdivision (3) *supra*, re-alignment was granted on account of the actual interest of a defendant although there was a "pretense of asking relief" against that defendant. However, in none of those cases did it appear that the defendant had openly and admittedly taken the active steps in behalf of the plaintiff that R. E. Dilatush has taken in this case in behalf of the plaintiff and against his co-defendants (petitioners).

B.

The Circuit Court of Appeals Has So Far Departed from Accepted Procedure in an Important Matter Affecting Procedure Generally Throughout the County, As to Call for the Exercise of the Power of Supervision by the Supreme Court.

The question of jurisdiction is always the primary one in Federal procedure. This Court has repeatedly held that resort should be had to the actual facts of the case to determine the real interest of the parties, and that they should be aligned accordingly, regardless of the pleadings filed in the case. It is, therefore, a matter of general concern as to whether the Federal jurisdiction may

be invoked simply because a plaintiff is entitled to a judgment against a particular defendant, when that defendant is actually and openly engaged in behalf of the plaintiff and against his co-defendants, and, as plaintiff states, "He has looked after this litigation for me" (Tr. 28).

If the defendant R. E. Dilatush had filed an answer asking for the relief demanded by his mother as plaintiff, there could be no question regarding the re-alignment:

Dawson v. *Columbia Ave. Saving Fund, etc., Co., supra.*

Indianapolis v. *Chase National Bank, supra.*

Edwards v. *Glasscock,* (5 Cir.) 91 F. 2d 625.

Since the Court is no longer restricted to the pleadings in determining the actual interest of the parties, there should be applied to the conduct of R. E. Dilatush in behalf of respondent the old saying "What you are speaks so loud I can not hear what you say!" Certainly, notorious activity by a defendant in behalf of a plaintiff should be given more consideration than a mere answer admitting that the plaintiff is entitled to the relief asked.

Mitchell v. *Maurer,* 293 U. S. 237, 79 L. Ed. 339.

Fidelity Bond & Mtg. Co. v. *Grand Lodge I. O. O. F.,* (6 Cir.) 41 F. 2d 326.

Maryland Casualty Co. v. *Boyle Constr. Co.,* (4 Cir.) 123 F. 2d 558.

State Farm Mut. Automobile Ins. Co. v. *Hugee,* (4 Cir.) 115 F. 2d 293, 300, 132 A. L. R. 188.

De Graffenried v. *Yount-Lee Oil Co.,* (5 Cir.) 30 F. 2d 574, cert. den. 279 U. S. 865, 73 L. Ed. 1003.

Farr v. *Detroit Trust Co.,* (6 Cir.) 116 F. 2d 807, 811.

In the recent case of *United States* v. *Johnson,* 319 U. S. 302, 87 L. Ed. 1413, there was a genuine desire on

the part of Johnson to secure a judicial determination of the validity of the Emergency Price Control Act. He selected counsel to file suit against himself, hoping to obtain this determination. The Government did not contend any false or fictitious statement of facts was submitted to the court, but this Court said: "such a suit is collusive because it is not in any real sense adversary. It does not assume the honest and actual antagonistic assertion of rights—a safeguard essential to the integrity of the judicial process" and directed dismissal of the suit as collusive.

The complaint here alleges fraud. Respondent and her son both admit she had no contact concerning the matter with any one other than the son; therefore any possible liability of petitioners comes through R. E. Dilatush. He is an indispensable party. He was made a party defendant by Respondent.

Lee v. *Lehigh Valley Coal Company*, 267 U. S. 542, 69 L. Ed. 782.

After referring to the rights of a defendant seeking to remove a suit from a state court to the District Court, the Court said:

> "It is a different question whether the plaintiff can repudiate the effect of his own joinder, can retain a party to the relief sought, and yet keep him on the wrong side in order to avoid the effect of his own act. Without inquiring whether the plaintiff could have maintained the suit alone had he so elected, and had he found it impossible to join Kate P. Dixon, obviously she was a 'necessary' even if not an indispensable party. *Shields* v. *Barrow*, 17 How. 130, 139, 15 L. Ed. 158, 160. It would be hard upon the Coal Company to compel it to submit to an adjudication upon the lease, upon a fraud alleged to have been committed against both owners, and to an account, in

the absence of one of the lessors. The joinder of both is much more than a mere form. As both are named, they must be arranged upon the side on which they belong. *Menefee* v. *Frost*, 123 Fed. 633; *Blacklock* v. *Small*, 127 U. S. 96, 32 L. Ed. 70, 8 Sup. Ct. Rep. 1096."

Conclusion.

The errors committed by the Honorable Circuit Court of Appeals for the Eighth Circuit and assigned by the petitioners were errors on points which were important and controlling in the decision of the Circuit Court of Appeals. It is believed that had the Circuit Court of Appeals held differently on any of these points its decision would not have been the same and the decision of the District Court would have been affirmed. It is also believed that the decision is in conflict with the established procedure of this Court and of other Circuit Courts of Appeal with reference to what constitutes a "controversy" sufficient to confer or sustain Federal jurisdiction.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

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